United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2459

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P/S

To be argued by
THOMAS E. ENGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2459

UNITED STATES OF AMERICA,
Appellee,

—v.—

LUIS NORBERTO OTERO, a/k/a "Izzy",
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Luis Norberto Otero, a/k/a "Izzy", appeals from a judgment of conviction entered on August 16, 1974 in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 73 Cr. 744, filed on July 31, 1973, charged Otero with the sale of approximately 118 grams of heroin on November 28, 1972 in violation of Title 21, U.S.C., Sections 812, 841(a)(1) and 841(b)(1)(A).

Otero's first trial commenced on February 25, 1974 and ended on March 1, 1974 with a declaration of a mistrial when the jury could not agree on a verdict.

The second trial commenced on June 24, 1974 and concluded on June 27, 1974 when the jury convicted Otero.

On August 16, 1974 Judge Frankel sentenced Otero to a term of imprisonment of two years to be followed by a special parole term of three years.

Otero is serving his sentence.

Statement of Facts

The Government's Case

On November 28, 1972 Special Agent Michael Gray of the Drug Enforcement Administration and an informant named Ramon Torres drove to the street corner of 170th Street and the Grand Concourse in the Bronx, arriving about 6:30 in the evening (Tr. 23-25, 52, 158). Other agents of the Drug Enforcement Administration followed Gray and Torres to conduct surveillance (Tr. 25, 92, 155). Torres left Agent Gray's car when it reached the corner, then crossed the street, and met for a few minutes with Otero on the southwest corner of the intersection (Tr. 25-27, 158).* Torres returned to Agent Gray's car, and they then drove a few blocks to 22 Elliott Place while Otero walked to the same destination (Tr. 28, 55, 159).

Torres again left Agent Gray's car and met with Otero about fifteen feet away from Agent Gray (Tr. 28-29, 56). Otero then handed Torres a brown paper bag which Torres brought to Agent Gray in the automobile (Tr. 29).

Gray and Torres drove a few blocks away where Gray field-tested the contents of the brown paper bag and then returned to 170th Street and the Grand Concourse (GX

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* Citations to the trial transcript are designated by the prefix "Tr.".

1-A; Tr. 30, 68, 159).* There, Gray handed Torres $4,500, and Torres crossed the street and gave the money to Otero (Tr. 30-31, 77-78, 160). Torres received $200 from Otero for his part in the transaction and gave that sum to Agent Gray the following day (Tr. 32-33, 99, 147).

On February 22, 1973 Special Agent Robert Nieves, accompanied by Torres, went to the Vesuvio Bar at 183rd Street and St. Nicholas Avenue in upper Manhattan, where Torres was employed as a bartender (Tr. 32, 38-39, 173-74). Torres introduced Nieves to Otero, who was called "Easy", and Torres and Otero began conversing in Spanish. Nieves, who speaks Spanish, joined the conversation from time to time, and at one point Torres told Otero that Nieves had been the person to whom Torres had delivered the previous package and that Nieves was mad at Otero because there had been no subsequent deals (Tr. 176-77). Otero asked Torres whether Nieves could be trusted, and Torres replied that he could be. Otero then said, "We don't talk about things like this in front of people that I don't know" (Tr. 178). After this, Otero told Nieves he was trying to sell a Cadillac for $3,300 and told him where it was parked. Nieves then left with Torres and went to look at the car which carried a New York license plate, FX 2014, returned to the Vesuvio, and told Otero he would be in touch with him if he decided to buy it (Tr. 39, 178-80).

Some time during the month of February, 1973, Agent Gray discovered the true name of Otero, who, up until that time, had been known only as "Easy" or "Izzy" and who had been tentatively identified as Angel Manzano, the registered owner of the Cadillac which Otero had been seen driving and which he had offered for sale to Agent Nieves (Tr. 30, 51, 104).

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* Government Exhibit 1-A was admitted in evidence and, pursuant to a stipulation, was described as having a net weight of 111 grams of which 39.9% was heroin hydrochloride, the remainder being sugar and mannitol (GX 1-A; Tr. 36, 194-95).

On March 27, 1973, Agent Gray conducted surveillance of the same Cadillac and observed the defendant driving it from the La Fuente Azul Bar in Manhattan to the Vesuvio Bar (Tr. 40). Prior to the issuance of an arrest warrant for Otero on June 18, 1973, Agent Gray had attempted to locate Otero by looking in the area where it was suspected that Otero was living and had conducted intermittent surveillance on the Cadillac, but aside from the occasion on March 27, Otero was not seen by the agents until July 21, 1973 when Agent Gray caught sight of Otero's car and the defendant at a gas station on 181st Street and Amsterdam Avenue and arrested the defendant (Tr. 41-42, 132-33, 146).

During the period between November 28, 1972 to February 22, 1973, Agent Gray had intended to make additional narcotics purchases from Otero, and during the entire period from November 28, 1972 to July 21, 1973, Agent Gray had used Torres as an informant in other active cases (Tr. 91, 103).

The Defense Case

The defense offered the sworn testimony of Ramon Torres from the first trial of Otero, it being explained to the jury that Mr. Torres was unavailable to both the Government and the defendant.* Luis Otero took the stand in his own defense. He testified that he worked for his brother in November, 1972 and generally worked long hours (Tr. 216-17). Finally, Otero testified that he had never bought or sold narcotics in his life, but

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* Ramon Torres was murdered shortly before the second trial of Otero, and, because of his death, the Government moved to sever and dismiss Indictment 73 Cr. 186 charging Otero with obstruction of justice by virtue of his threat to have Torres killed if he testified at the trial beginning February 25, 1974. (Tr. 221, 248-49). This indictment had been consolidated with 73 Cr. 744 at the first trial (Tr. 3-4, 195).

could not remember where he had been on November 28, 1972. (Tr. 217). Otero testified that there was no record or piece of paper and no person anywhere that could verify his whereabouts during the early evening of that day (Tr. 217-18). Otero admitted that he and Nieves had met and discussed the sale of Manzano's car (Tr. 250).

ARGUMENT

There is no merit to the claim of prejudicial pre-indictment delay.

The sole issue presented by this appeal is whether the District Court erred in denying Otero's motion to dismiss the indictment because approximately eight months elapsed between the date of the offense and the date of the filing of the indictment. Both the facts and the applicable law support the correctness of the decision below.

In *United States* v. *Marion*, 404 U.S. 307 (1971) the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against unreasonable pre-indictment delay if he can establish that the delay prejudiced his right to a fair trial and resulted from prosecutorial misconduct designed to harass or to gain some tactical advantage against him. As this Court's most recent pronouncement on this issue makes clear, *United States* v. *Brown*, Dkt. No. 74-1947 (2d Cir. February 20, 1975), slip. op. 1847, both prejudice *and* prosecutorial misconduct must be proven in order to make out a successful claim under the Due Process Clause:

> "There is a surprising amount of discussion in numerous opinions of various Courts of Appeals in the federal judicial system relating to what might some day be proved or even plausibly alleged by a defendant in a criminal case to justify the dismissal of an

> indictment for prosecutorial misconduct in failing promptly to seek an indictment. That there must be some such showing is the mandate of *United States* v. *Marion*, 404 U.S. 307, 325 (1971). Here the record is completely bare as to prejudice to the appellant and as to prosecutorial misconduct. The motion for a hearing was properly denied." *Id.* at 1850-51.

Claims of prejudicial pre-indictment delay, some possessing far more apparent substance than the one presented here, have been repeatedly rejected by this Court. See, *e.g.*, *United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972) (two month delay); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (approximately four year delay); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (four year, 11 month delay); *United States* v. *Schwartz*, 464 F.2d 499, 503-04 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (four and a half year delay); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974) (13 month and 18 month delays); *United States* v. *Brown*, *supra* (17 month delay).*

The only claim of prejudice asserted here is that at trial appellant could not recall his whereabouts on November 28, 1972 (Tr. 217, 301-02). However, the alleged dimming of appellant's recollection does not rise to the constitutional dimensions of the "'specific prejudice" required by *Marion*.

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* The principles underlying *Marion* were applied by this Court before *Marion* in rejecting similar claims. See, *United States* v. *Simmons*, 338 F.2d 804, 806-07 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965) (11 month delay); *United States* v. *Wilson*, 342 F.2d 782, 783 (2d Cir.), *cert. denied*, 382 U.S. 860 (1965) (four and a half month delay); *United States* v. *Hammond*, 360 F.2d 688, 689 (2d Cir.), *cert. denied*, 388 U.S. 918 (1966) (15 month delay); *United States* v. *Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) (four year, 11 month delay); *United States* v. *Capaldo*, 402 F.2d 821 (2d Cir.), *cert. denied*, 394 U.S. 989 (1968) (three year, four month delay); *United States* v. *Parrott*, 425 F.2d 972, 976 (2d Cir. 1970) (three year delay).

United States v. *Ferrara, supra,* 458 F.2d at 875; *United States* v. *Briggs, supra,* 457 F.2d at 911; *United States* v. *Parrott, supra,* 425 F.2d at 976; *United States* v. *Hammond, supra,* 360 F.2d at 689. The claim that Otero could have presented an alibi defense is too speculative and the evidence against him too weighty for this Court to conclude that the delay deprived him of a fair trial. *United States* v. *Mallah,* 503 F.2d at 989.*

Far from disclosing any intentional delay by the Government in the prosecution of this case, the record clearly shows that the arrest of the defendant was delayed by the Government's efforts to identify the defendant, to determine whether he would engage in subsequent narcotics transactions, and to continue the efforts of the informant to secure other introductions to suspected narcotics dealers. Agent Gray testified that the agents attempted to find the defendant in the area where they thought he lived and attempted to look for his automobile (Tr. 42). Further, it was not until February, 1973 that Agent Gray discovered that the true name of the defendant was Luis Norberto Otero (Tr. 104). The record also is clear that Agent Gray and other agents were working on other cases with Torres, the informants (Tr. 91, 103), and that even the delay between the first transaction on November 28, 1972, and the second attempt to negotiate with Otero on February 22, 1973 was not unusual in view of the agents' concern with these other cases (Tr. 135). Finally, Torres was valuable as an informant, and his value and life would have been placed

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* In assessing the substantiality of Otero's claim of lack of recollection, this Court should not ignore Judge Frankel's finding that Otero's testimony at trial was perjurious. ("I have said, and I do take it into account, that it is perfectly clear that the jury had to be convinced beyond a reasonable doubt that Mr. Otero was lying when he denied all participation in the heroin transaction, and I, too, am so convinced, and I believe that that is a factor that weighs against him in the sentencing determination (Tr. 418). *Cf. United States* v. *Hendrix,* 505 F.2d 1233, 1235-37 (2d Cir. 1974).

in serious jeopardy if narcotics dealers to whom Torres had introduced the agents were arrested precipitously (Tr. 103).

Similar considerations were found by this Court in *United States* v. *Feinberg, supra,* to justify the conclusion that strict judicial scrutiny of pre-arrest policies by law enforcement agencies would be unwise:

> "Acceptance of the proposition advanced by appellant [judicial scrutiny of pre-arrest policies] would encourage hasty, less efficient investigation and premature deprivations of freedom, curtail the investigation of organized crime, and lodge with enforcement agents the procedural onus of record in detail every event in the investigative process. In short, fear of forfeiting a prosecution would frequently induce unreasonable speed which would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. *United States* v. *Ewell,* 383 U.S. 116 at 120 (1964)." 383 F.2d at 67.

Similarly, in *United States* v. *Dickerson,* 347 F.2d 783, 784 (2d Cir. 1965), the completion of an undercover narcotics investigation justified a seventeen month pre-arrest delay. *Accord, United States* v. *Simmons, supra; United States* v. *Briggs,* 457 F.2d 908 at 911. ("The Government tells us the relatively short delay in arrest caused by a desire to catch other fish in its net, a legitimate consideration in law enforcement.") *United States* v. *Feinberg,* 383 F.2d at 65, n. 2. *Cf. United States* v. *Iannelli, supra,* 461 F.2d at 485.

The record here plainly establishes that the eight month delay between offense and indictment was attributable solely to legitimate law enforcement considerations.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Thomas E. Engel, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of March, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Robert Bloom, Esq.
351 Broadway
New York, New York 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas E. Engel

THOMAS E. ENGEL

Sworn to before me this
21st day of March, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975